OCC decisions they dislike; air grievances relating to negotiations outside Oklahoma that should be considered by the appropriate state commission;[20] or simply raise abstract objections to SWBT's offerings that are unrelated to any foreseeable request by a CLEC. This Commission should do what the OCC did (but the DOJ did not) and consider the motives and experiences of CLECs who raise objections, as well as SWBT's evidence. By approving the recommendation and findings of the OCC, it should send a message that section 271 proceedings will not degenerate into free-for-alls where opponents may obtain a hearing on any claim, no matter how firmly foreclosed, unripe, or irrelevant.[21]

1. Pricing.[22] The OCC expressly determined that SWBT's prices for checklist elements meet the requirements of the Act, both on the full record of its section 271 proceeding, OCC at 9-10 & Order at 3, and when approving specific rates in the AT&T arbitration. Br. App.

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[20] E.g., Texas Association of Long Distance Telephone Companies at 3; USLD at 3.

[21] Congress' concern for swift processing of section 271 applications, see § 271(d)(3), together with its requirement that the Commission state "the basis for its approval or denial" of each application, id., also requires the Commission to determine and rule upon Southwestern Bell's compliance with the checklist (as well as all other relevant legal and factual issues) point-by-point. Otherwise, long distance and local competition will be needlessly delayed, as Bell companies attempt to divine the Commission's standards through trial and error. This approach also would allow the Commission later to rule on a future application without revisiting checklist issues, if it should find that Southwestern Bell has satisfied the checklist but not some other requirement.

[22] Affidavits filed with this Reply address additional checklist items not specifically discussed here. See, in particular, the Reply Affidavits of William Adair (numbering administration), James Hearst (poles, ducts, conduits, and rights-of-way), Richard K. Keener (directory assistance), and William Dysart (performance measurements).

Vol. III, Tab 9. Because sections 251 and 252 of the Communications Act reserve pricing issues to the states, the OCC's findings on SWBT's compliance with section 252(d) are conclusive.[23]

Moreover, as the OCC has explained, neither the fact that there may be future state cost proceedings, nor SWBT's incorporation of certain existing rates into its Statement and agreements, bear on the question whether SWBT's rates for network elements are cost-based. OCC at 9. Section 271 mandates no particular procedures for determining compliance with pricing requirements, yet the OCC reached its determination upon the full record of the AT&T arbitration (including numerous cost studies) and the voluminous record of its section 271 investigation. And while some parties claim that CLECs will find entry too risky when rates are interim, the OCC observed that its ability to "true-up" SWBT's rates provides assurance that CLECs will pay the interim rate or less. Id.

2. Interconnection. The OCC also rejected assertions by numerous parties that Brooks Fiber has been unable to obtain collocation from SWBT in Oklahoma. OCC at 6. The facts clearly support the OCC's conclusion that SWBT is providing collocation in accordance with its agreements and the Act. Brooks Fiber currently has 2 operational virtual collocation arrangements with SWBT in Oklahoma.[24] In addition, 11 physical collocation cages have been

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[23] Southwestern Bell presented its legal arguments on this point to the Eighth Circuit in Iowa Utilities Bd. v. FCC, No. 96-3321. Relevant portions of the briefs filed by Southwestern Bell (with other LECs) are attached as Exs. 20 (opening brief at 21-31) and 21 (reply at 3-15) and are incorporated by reference.

[24] Although DOJ suggests that virtual collocation arrangements are inherently incapable of giving Brooks the same "technically and economically feasible access" to UNEs as physical collocation, this simply is not the case. DOJ at 32-33. In particular, if there is any technical difficulty in using virtual collocation to access unbundled loops, it lies in the equipment chosen

turned over to Brooks Fiber by SWBT in the State. Seven of the 11 physical collocation jobs were finished in less than 85 days and none took longer than 140 days. Sheffield Aff. ¶ 4. Brooks does not yet have operational physical collocation with SWBT because SWBT is waiting for Brooks to finish installing its equipment. Falkinburg Aff. ¶ 14; Sheffield Aff. ¶ 3.

Brooks Fiber concedes that any delays in processing its collocation orders were attributable in significant part to Brooks' own "confusion" and changing requests. Brooks Fiber at 20 & n.17; see Sheffield Aff. ¶ 5. Moreover, Brooks acknowledged before the OCC that "the collocations issues, as an example, were working themselves out as both Brooks Fiber and SWBT became more familiar with each other's needs." OCC Chairman Graves at 2; see Apr. 23 Tr. at 115-20 (testimony of Mr. Cadieux) (Ex. 22 hereto); also compare DOJ at 33-34 (relying on Dobson Wireless claims) with Sheffield Aff. ¶ 6 (discussing same). SWBT nevertheless has taken, and continues to take, appropriate steps to improve its own procedures for soliciting and receiving collocation orders. Falkinburg Aff. ¶ 8; Sheffield Aff. ¶ 10.

Arguments that the checklist somehow prohibits SWBT from pricing collocation on a case-by-case basis ignore that each collocation job is a separate construction project that needs to be tailored to the CLEC's requirements. The cost depends upon such variables as location, amount of space required, and power and cabling demands. Falkinburg Aff. ¶¶ 5-6; Sheffield

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by Brooks. See Deere Reply Aff. ¶¶ 30-33.

Aff. ¶ 8.[25] Additional interconnection issues are addressed in detail in the Reply Affidavits of William Deere, Jan Falkinburg, and Randall Butler.

3. Processing of UNE Orders. Southwestern Bell is in full compliance with the Commission's UNE rules. AT&T in particular makes much of its desire to obtain a UNE "platform" from SWBT — another issue considered and rejected by the OCC. Stripping away the jargon, AT&T seeks the ability to specify a retail service (by type, or perhaps even by the end user who receives it) and then have SWBT identify and assemble the combination of UNEs that precisely replicates that service. See Falkinburg Aff. ¶ 19; Ham (OSS) Reply Aff. ¶ 25. This would allow AT&T to obtain SWBT services at UNE "cost-plus" rates rather than at the wholesale discount for resold services, even though AT&T would order the retail service.

In its Local Interconnection Order, the Commission held that CLECs may "use solely recombined network elements" to compete against incumbents. Local Interconnection Order ¶ 335. This essentially nullifies wholesale discounts: In the long term, CLECs will not buy services for resale at the OCC's 19.8% discount off the retail rate when they can order end-to-end UNEs at a discount in the range of 41%, and simultaneously avoid contributing to recovery of SWBT's network costs by evading access charges. See Falkinburg Aff. ¶ 17. Southwestern Bell has presented to the Eighth Circuit its legal objections regarding the ability of CLECs to

[25] As to specific price quotes, Cox states that SWBT gave it "four different responses" to a request for physical collocation. Storey Aff. ¶ 6. These price quotes, however, reflect the very process discussed above, whereby SWBT has made its generally applicable policies more flexible to accommodate CLECs' needs as they are presented to SWBT. Sheffield Aff. ¶ 7. And while Dobson Wireless is unhappy with a SWBT quote, Dobson admits it has not presented any evidence that would support a claim of unreasonable pricing. Dobson at 7.

substitute UNEs for resale, and incorporates them here by reference. See Ex. 20 at 64-69 (opening brief); Ex. 21 at 42-45 (reply). If Southwestern Bell's position is upheld by the Court of Appeals, that will dispose of the "platform" arguments in this proceeding.

In any event, however, this Commission's policy of allowing complete rebundling provides no support for AT&T's claim that SWBT should bear the burden, expense, and liability of translating CLECs' ultimate service objectives into UNE orders. The "platform" issue does not involve AT&T's ability to assemble UNEs into the equivalent of a SWBT retail service. Subject to the Eighth Circuit's decision, SWBT allows all CLECs to do this. See Statement App. UNE § 2.2. The issue does not involve AT&T's ability to have SWBT reassemble UNEs on AT&T's behalf. That service, too, is available. Id. §§ 2.2.1, 2.3. The "platform" issue does not even involve AT&T's ability to determine what services a particular end user currently takes (and thus what UNEs are necessary to replicate those services). CLECs can do this through SWBT's existing OSSs. Falkinburg Aff. ¶¶ 20-25. The only issue is whether AT&T must identify what UNEs it needs to serve its customers and then place UNE orders through the SWBT systems that have been designed for that purpose.[26]

SWBT has configured its systems to process orders for resold services (as such) and orders for UNEs (as such). This is consistent with the FCC's requirement that UNEs be offered separately, for a separate charge, 47 C.F.R. § 51.307(d), as well as the requirement that "an

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[26] This issue, moreover, is not even ripe, for AT&T is merely raising a dispute that has arisen in contract negotiations, and has not signed an interconnection agreement or sought to order any UNEs from SWBT. In that regard, AT&T's effort to blame SWBT for delays in completing interconnection negotiations is absolutely unfounded, as AT&T's history of forcing arbitrations across the nation suggests and the Reply Affidavit of Ricardo Zamora details.

incumbent LEC must provide, upon request, nondiscriminatory access to operations support systems functions for pre-ordering, ordering, provisioning, maintenance and repair, and billing of UNEs under section 251(c)(3) and resold services under section 251(c)(4)." Local Interconnection Order ¶ 525; see Falkinburg Aff. ¶ 22. There is simply no requirement that SWBT determine as part of the UNE ordering process what UNEs would best match AT&T's requirements, when AT&T can obtain that information by using the appropriate SWBT OSS function. Rather, as the Commission specifically found, "requesting carriers must specify to incumbent LECs the network elements they seek before they can obtain such elements on an unbundled basis." Id. ¶ 297. While SWBT will work with AT&T and other CLECs to assist them in identifying the elements they need, id., AT&T bears responsibility for deciding what UNEs to order.

AT&T and other interexchange carriers make a related claim (also rejected by the OCC) that SWBT has violated its checklist duties by treating some UNE orders as "design services." See AT&T at 22-23. Like the platform issue, this argument relates to the functioning of SWBT's systems for ordering and provisioning UNEs. These systems have been developed specifically to fill requests for particular UNEs or combinations of UNEs — not, as AT&T would like, to process CLECs' requests for finished retail services.

AT&T suggests that SWBT's procedures for UNE orders involve unnecessary service disruptions, lower service quality, restrictions on the volume of orders that can be processed, and higher prices in the situation where a CLEC asks SWBT to convert an end user's retail service to the equivalent combination of UNEs. These claims are specious. SWBT will never intentionally

cause an unnecessary service disruption, a point that has been made to AT&T on numerous occasions. See, e.g., Attach. 1 to AT&T's Falcone/Turner, at 2 (letter from Stephen M. Carter to Rian Wren). In particular, residential customers ordinarily will be moved from SWBT's "POTS" service to a CLEC service that uses equivalent SWBT UNEs without any interruption of service, and SWBT's design service procedures will not apply. Deere Reply Aff. ¶ 5. AT&T thus grossly misrepresents the facts when it asserts that customers routinely will "endure a service outage for 30 minutes." AT&T at 22.[27] AT&T also is wrong when it states that SWBT's procedures result in "poorer quality service" and are unnecessarily "labor intensive." AT&T at 22. In the POTS conversion that is the focus of AT&T's comments, for instance, the end user's service will (insofar as it is provided by SWBT) be exactly the same quality before and after the conversion, for precisely the same facilities will be used before and after. Deere Reply Aff. ¶ 5. To the extent that the conversion to UNEs will entail a loss of SWBT's mechanized loop testing capabilities, SWBT has offered to consider a request to develop similar testing capabilities on AT&T's behalf. Attach. 1 to AT&T's Flacone/Turner at 2. There also will be no unnecessary labor or labor-related delays. Pricing, is cost-based and consistent with the methodology approved by the OCC. Falkinburg Aff. ¶¶ 25-26.

4. OSS Access. Southwestern Bell's duty to develop interfaces under the checklist is no greater than its OSS obligations under sections 251 and 252. § 271(c)(2)(B)(ii); see Local Interconnection Order ¶ 516. Under the Commission's construction of the Act, SWBT

[27] SWBT explained in a letter appended as Attachment 2 to AT&T's Falcone/Turner Affidavit that it anticipates average service gaps "of 30 minutes or less" when the CLEC orders a UNE combination that differs from what SWBT has used to provide its retail service. In this situation, filling the CLEC's order is not simply a matter of reprogramming the switch and making billing changes. See Deere Reply Aff. ¶ 5.

must: (1) ensure that CLECs can access SWBT's existing OSS functions on a nondiscriminatory basis; (2) negotiate in good faith access through interfaces that do not exist today; and (3) implement new forms of access where technically feasible and a CLEC is willing to pay the associated costs. Local Interconnection Order ¶¶ 278, 314, 523, 525. The OCC conducted an on-site investigation of SWBT's OSS compliance and properly held that SWBT satisfies all applicable requirements. It properly rejected claims that SWBT must put into operation any OSS interface competitors desire, even if the interface is not used in SWBT's own retail operations, does not meet industry standards, and is not useable by other CLECs.

SWBT has taken several distinct steps to open its OSSs to CLECs. First, SWBT provides CLECs absolute parity in accessing OSS functions by offering them the very interfaces SWBT and its customers use in SWBT's own retail operations. As Chairman Graves of the OCC has informed this Commission (OCC Chairman Graves at 2-3), "SWBT is providing OSS at the same level they provide it internally." For resale orders, SWBT provides CLECs access to EASE, the electronic interface used by SWBT retail service personnel. Even the DOJ apparently recognizes that EASE allows CLECs "to perform the identical service ordering functions as SBC's retail units." DOJ at 74. For UNEs, SWBT has five different OSS interfaces that provide access to pre-ordering and maintenance and repair functions, each of which is in place, operational, and heavily used. Ham (OSS) Reply Aff. ¶ 10. These interfaces have been tested by processing thousands upon thousands of actual transactions, in many cases on behalf of the major interexchange carriers. Brief at 26-28; see also Ham (OSS) Reply Aff. ¶ 10. AT&T and other

CLECs are currently testing some of these systems specifically for use in their local businesses, and have reported no problems. Ham (OSS) Reply Aff. ¶¶ 11, 23.[28]

Second, SWBT has developed new electronic interfaces in accordance with industry standards, where standards exist. An EDI interface is now available to CLECs for orders relating to unbundled local loops, interim number portability, and switch ports. Ham (OSS) Aff. ¶ 31. Where industry standards are not yet in place, SWBT has committed to incorporate new standards into its interfaces, on its own initiative, within 120 days of their issuance. Id. ¶ 31.

Third, SWBT has developed new state-of-the-art interfaces in anticipation of industry standards. SWBT's EDI Gateway, which reflects such efforts where national standards do not exist, is ready to be used by CLECs. It has been fully tested by SWBT and is capable of supporting requests for resold services and UNEs. Ham (OSS) Reply Aff. ¶¶ 13-14, 21 & Attach. A. Indeed, SWBT has been ready to begin joint tests of its EDI Gateway with CLECs for five months. Id. ¶ 14. Only AT&T, however, is far enough along in its electronic interface development to begin joint testing; after delaying joint tests several times, it finally consented to begin in April. Id.; see AT&T at 30.[29] SWBT has completed or is developing additional, Windows™-compatible interfaces to accommodate CLECs lacking EDI capability. Ham (OSS) Aff. ¶¶ 23, 32.

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[28] These track records are far from "mere assertion[s]" that SWBT is capable of processing CLECs' transactions. AT&T at 31. They also are much more reliable than attempts to compare OSS capabilities to the projected needs of AT&T and other CLECs, particularly given that the "forecasts" of demand produced by AT&T are almost laughably inflated. Ham (OSS) Reply Aff. ¶¶ 20-21.

[29] Such delays are commonplace. To give another example, AT&T recently told SWBT that it would not be ready to begin joint testing of SWBT's electronic bonding interface for at least six months. Ham (OSS) Reply Aff. ¶ 23.

Fourth, SWBT will develop technically feasible electronic interfaces — beyond those it provides itself and those reflecting industry standards — for individual CLECs so long as those CLECs are willing to pay for customized access to SWBT's OSS systems. See, e.g., Statement App. OSS at 8. For example, SWBT has worked with AT&T to meet its needs for EDI interface functions pending completion of the national standards-setting process. Ham (OSS) Aff. ¶ 48. Where AT&T desires an interface that departs from industry standards and SWBT's existing systems, however, AT&T must request and pay for this specially tailored access. SWBT will not, and indeed cannot under the Act, favor AT&T's needs over those of other CLECs. SWBT's standard OSS interfaces are designed to meet the needs of CLECs generally, not any one carrier.

Because SWBT provides CLECs whatever interfaces it provides itself, and meets CLECs' individual needs with additional interfaces, opponents resort to blaming SWBT for their own failure to be ready to take SWBT up on its offer. They argue that SWBT "cannot begin to make the required showing" of OSS compliance because no CLEC has yet utilized SWBT's electronic interfaces. AT&T at 32; see DOJ at 80-81 (CLECs' failure to use electronic interfaces places "heavy burden" on SWBT). This is another unlawful effort to turn section 271 into a test of CLECs' local entry plans. As a legal matter, SWBT's interLATA entry cannot be delayed by CLECs' ordering decisions. As a factual matter, SWBT has done everything within its power to encourage CLECs to utilize its OSS functions. It has established support organizations for CLECs (including an OSS Help Desk that has personnel available all the time) and has demonstrated its electronic interfaces for AT&T, MCI, Sprint, and other CLECs. Ham (OSS)

Reply Aff. ¶ 3.[30] SWBT also offers CLECs 90 days of access at no charge so they can evaluate the OSS applications and/or use the OSS functions in "live" mode. Ham (OSS) Reply Aff. ¶ 3.

In sum, a CLEC that wishes to place orders with SWBT has a choice of manual interfaces (which are being used successfully, Ham (OSS) Aff. ¶ 34), proprietary electronic interfaces used by SWBT or developed by SWBT for CLECs' use, industry-standard interfaces where standards exist, or any other technically feasible interface the CLEC chooses to order. If the CLEC chooses a SWBT-developed or industry-standard interface, SWBT will have already met the CLEC's needs. If it chooses an interface of its own, SWBT will (upon a proper order) develop a compatible interface in cooperation with the CLEC. And if the CLEC chooses a manual interface because it is not yet ready to use any of the electronic alternatives, that is its choice and does not reflect any failing of Southwestern Bell. To the contrary, the fact that SWBT is ahead of all CLECs in Oklahoma with respect to implementation of electronic interfaces conclusively disproves suggestions that OSS access has slowed competitors' entry into the local exchange.

5. Loops, Trunks, and Switching. The OCC held that SWBT satisfies its obligation to unbundle loops, trunks, and switching. Opponents make no sustainable objection to this finding, either. For instance, AT&T maintains that SWBT "has refused to provide" access to multiplexing." AT&T at 26. Yet multiplexing is available to all CLECs by virtue of the bona fide request procedures in the Statement and SWBT's OCC-approved agreements. Deere Reply Aff. ¶ 26. Likewise, while AT&T and others contend that SWBT "has refused to commit" to

[30] AT&T's contrary claim — that SWBT will not make available OSS interface specifications for ordering UNEs, AT&T at 29 — is false. SWBT has provided such specifications to AT&T and other CLECs promptly upon request, and has even tailored their format to AT&T's particular desire for an "eye chart" format. Ham (OSS) Reply Aff. ¶ 27.

offering customized routing, AT&T at 25-26, customized routing is expressly available under the Statement and the Sprint Agreement and has been offered to AT&T. See Deere Reply Aff. ¶¶ 15-18. Other examples of opponents' poor research or outright misrepresentations include, for instance, the false claims that SWBT "fail[s] to offer" DS1 trunk ports" (WorldCom at 35; see Br. App. Vol. IV, Tab 27, at 48; Deere Reply Aff. ¶ 24) and "refuses to offer" unbundling of loops that are behind Integrated Digital Loop Carrier ("IDLC") equipment (AT&T at 26; see Deere Reply Aff. ¶¶ 6-8). SWBT also will comply with the OCC's order to provide access to "regulated" dark fiber. OCC Arbitration Order at 4; see Deere Reply Aff. ¶ 25.

6. Interim Number Portability ("INP"). The OCC looked closely at INP issues and found, as Chairman Graves explained, that "[t]he fact is SWBT is providing the interim number portability support that the OCC ordered in the SWBT/AT&T Arbitration Decision." OCC Chairman Graves at 2. Consistent with the Act and the orders of this Commission and the OCC, SWBT makes available INP through remote call forwarding or direct inward dialing, at the CLEC's option. Brief at 37-38. Arguments that SWBT should provide additional methods of INP were specifically rejected by the OCC and are inconsistent with this Commission's Number Portability Order as well. Baker-Oliver Reply Aff.; Order, FCC No. 96-286 at ¶ 110.

The DOJ and other parties rely on incidents that occurred months ago, in which several new Brooks customers did not receive incoming calls due to difficulties with remote call forwarding. The OCC concluded these incidents were "initial start-up problems" that "have been resolved or are being resolved." OCC at 6; see Butler Reply Aff. ¶¶ 12-18. Indeed, SWBT has successfully ported 2500 lines for Brooks Fiber "with little or no problem," earning the praise of Brooks Fiber personnel in the process. Butler Reply Aff. ¶¶ 4, 13.

That is not to say that every INP order has gone off perfectly. Miscommunications still occur, but problems have been due in large part to Brooks' own errors. As Brooks Fiber concedes, they do not reflect technical problems with SWBT's INP procedures or an unwillingness to provide this service. Brooks Fiber at 25; see Butler Reply Aff. ¶¶ 14-18.

7. Resale. Finally, the opponents fail to present any basis on which this Commission could override the OCC's assessment of Oklahoma markets and find that SWBT has fallen short in meeting its obligation to allow resale of its retail services. SWBT currently is furnishing services for resale in Oklahoma to Brooks Fiber, Dobson Wireless, and Western Oklahoma Long Distance. Falkinburg Aff. ¶ 46. The conditions associated with this service — such as the requirement that the reseller abide by the terms of the retail tariff and limitations on resale of short-term promotions — were approved by the OCC in the AT&T Arbitration (Br. App. II, Tab 9, at 4-6) and in several cases have been specifically approved by this Commission as well. Falkinburg Aff. ¶¶ 32-43.

III. SOUTHWESTERN BELL WILL COMPLY WITH SECTION 272

Opponents of interLATA relief argue that solid evidence of Southwestern Bell's intention, ability, and methods of compliance with section 272 is not enough. They suggest that the Commission should hold applicants for 271 relief to the standard of past compliance with all requirements of section 272. They even suggest that Bell company interLATA affiliates should have been abiding by new rules the Commission adopted to enforce section 272, even before those rules were promulgated and effective. See, e.g., AT&T's Crombie ¶¶ 8, 18.

That is not logical, and it is not the law. The Commission's task is to determine whether "the requested authorization will be carried out in accordance with the requirements of section

272." § 271(d)(3)(B) (emphasis added). Section 272, in turn, applies to Bell operating companies and their affiliates at the time they provide specified services such as in-region, interLATA services. § 272(a). Southwestern Bell's Brief and supporting affidavits detail how SBLD and SWBT will comply with the safeguards of section 272 upon SBLD's provision of interLATA services in Oklahoma. The accompanying reply affidavits of John Gueldner, Elizabeth Ham, Kathleen Larkin, Karol Sweitzer, and Jim Riley further address section 272 compliance by rebutting opponents' claims. This establishes Southwestern Bell's satisfaction of section 271(d)(3)(B).

Opponents' assertions notwithstanding, all transactions between SBLD and SWBT have been conducted and recorded consistent with the Commission's affiliate transaction and cost allocation rules, as then effective. See Larkin Aff. § C; Sweitzer Reply Aff. ¶ 3. By abiding by these rules in advance of its receipt of section 271 authority, SBLD has ensured that it will enter the long distance business in Oklahoma with no improper advantage over its competitors.

IV. THIS COMMISSION SHOULD ADOPT THE OCC'S FINDING THAT APPROVAL OF SOUTHWESTERN BELL'S APPLICATION WOULD BENEFIT THE PUBLIC

Opponents' public interest arguments rest at bottom on the same erroneous arguments discredited above. Although cloaked now in "public interest" terminology, their position reduces to the familiar claim that Southwestern Bell's interLATA entry should be defeated by the CLECs' own business decisions to postpone local entry. But Congress wanted parallel opportunities for entry, not parallel delays, and it wanted as much competition as possible as soon as possible. Because the local exchange in Oklahoma is open, and competitive opportunities are there for the taking, the public interest cannot be served by delaying Southwestern Bell's interLATA entry.

Opponents maintain that Congress must have intended for the public interest inquiry to include a litmus test of local competition, for otherwise there would be nothing left for the Commission to decide once it determined that the checklist has been satisfied and section 272's safeguards will be implemented. E.g., AT&T at 39-40; MCI at 29-30. This argument ignores the express instructions that Congress gave the Commission. After rejecting "metric" tests as part of the local market requirements of section 271(c),[31] Congress told the Commission that it could not resurrect these tests or extend the local competition requirements in any fashion, including by way of the public interest inquiry.[32]

Limiting the public interest inquiry as Congress intended does not render that inquiry meaningless.[33] The public interest inquiry was included in section 271 largely to address the professed concerns of the interexchange carriers, so that an expert agency could confirm Congress' judgment that open local markets and regulatory safeguards would effectively prevent

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[31] Indeed, the Act's opponents criticized it precisely because it "does not require that competition actually exist in local markets . . . before [RBOCs] are able . . . to enter long distance markets." 141 Cong. Rec. S8470 (statement of Sen. Feingold).

[32] § 271(d)(4); see Southwestern Bell's Brief at 52-56; 141 Cong. Rec. S7967 (statement of Sen. Pressler) ("The FCC's public-interest review is constrained by the statute . . . . [T]he FCC is specifically prohibited from limiting or extending the terms used in the competitive checklist."). Nor can the Commission escape this limitation by invoking the Department of Justice's recommended approach. The "substantial weight" to be accorded to the views of the Attorney General does not extend to interpretations of the Act, but rather is limited to her "expertise in antitrust matters." 142 Cong. Rec. H1176 (statement of Rep. Johnson-Lee); 142 Cong. Rec. H1178 (statement of Rep. Sensenbrenner) ("FCC's reliance on the Justice Department is limited to antitrust related matters"). The Commission is powerless to follow an erroneous interpretation of the Act, regardless of its source.

[33] To the contrary, a further test of local competition would render the Act's express prerequisites for interLATA entry pointless. If Congress had authorized the Commission to delay Bell company entry until local markets were competitive, section 272's regulatory safeguards against discrimination and cross-subsidy would be unnecessary. See Gordon Reply Aff. ¶¶ 5-6.

competitively harmful discrimination or cross-subsidy.[34] The public interest test also allows the Commission to reject an application due to special circumstances that would not have been presented to Congress, such as a record of disqualifying conduct by the particular applicant.

The Commission might conceivably find special circumstances that would justify denying a particular application under the public interest test despite compliance with all other prerequisites. As a general matter, however, the Commission has expressed confidence that new and pre-existing safeguards can prevent cross-subsidy and discrimination. The Commission has explained (in its Accounting Safeguards and Non-Accounting Safeguards orders, its approval of the SBC/PacTel merger, and elsewhere) that price-caps, structural separation, and accounting rules prevent cost-misallocation and predatory pricing, and that existing monitoring and reporting requirements prevent technical and price discrimination. Brief at 74-84. Just recently, in its Regulatory Treatment of LEC Provision of Interexchange Services order (FCC 97-142), the Commission again confirmed the effectiveness of regulatory safeguards and market constraints in preventing Bell companies from engaging in cost misallocation, ¶¶ 104-06, price squeezes, ¶¶ 126-29, predation, ¶ 108, and discrimination, ¶¶ 111-19; see also Price Caps Order, FCC No. 97-159, ¶¶ 14, 144-51 (rel. May 21, 1997) (further eliminating incentives for cost-shifting). The Department of Justice appears to share in this assessment.[35]

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[34] See 141 Cong. Rec. S7969 (statement of Sen. Lott) (public interest test allows Commission to confirm that local interconnection requirements and regulatory safeguards "make sure that we have a fair and level playing field"); 141 Cong. Rec. S7888 (statement of Sen. Pressler) ("After Bell companies satisfy all the requirements, the FCC must, in effect, certify compliance by making a public interest determination.").

[35] DOJ's consultant offers several reasons why BOCs would have difficulty degrading access needed by IXCs. Schwartz Aff. ¶ 140. First, and "[m]ost importantly, regulatory and antitrust safeguards can do a far better job of enforcing such existing access arrangements given

By virtually eliminating the possibility of competitive harm, the Commission's regulatory safeguards reinforce its longstanding presumption that new entrants and new services benefit the public. SWBT Br. at 53-54. Some suggest, however, that by temporarily continuing MFJ restrictions and specifically requiring the Bell company applicant to obtain Commission approval before offering interLATA services, section 271 wipes out the presumption. E.g., MCI at 28-29; AT&T at 38-39. Yet section 214, under which the public interest criteria were developed, is structured the same way as section 271: section 214(a) establishes a prohibition that applies "unless and until there shall first be obtained from the Commission a certificate that the present or future public convenience and necessity require or will require" new entry.

In light of the Commission's findings that its safeguards are adequate and its unchallenged presumption that new entry (including long distance entry by incumbent LECs) is beneficial, the interexchange carriers' speculation that Bell company entry might harm competition and the public are too little, too late. And if the Commission's own findings were not sufficient, then concrete market experience would do. Southwestern Bell's Brief (at 85-91) demonstrated that each time a local exchange carrier has sought to enter a market adjacent to the local exchange (including long distance) the interexchange carriers have offered the same dire predictions, and each time they have been proven wrong by concrete market experience. Should any doubt remain about the merits of the interexchange carriers' assertions, the attached reply affidavits of Alfred Kahn and Timothy Tardiff, and Kenneth Gordon, discredit their false predictions one by one.

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the long track record of experience with them." Id. Next, "a BOC would face some technical difficulties today in finely targeting for discrimination only pieces of the network that serve IXCs or their customers." Id. " Finally, some of the markets which the BOCs are said to target if allowed interLATA entry, low- to medium-volume residential and business customers, are also ones where IXCs require relatively simpler access arrangements." Id.

Moreover, affiants David Sibley and Dennis Weisman, who have investigated the economic incentives of Bell companies that have interLATA operations (and whose work is cited as supposed support for the interexchange carriers' theories, MCI's Hall ¶¶ 123-126), explain that, in all likelihood, SBC "would not have incentives to discriminate against rivals [in the interexchange business] but, in fact, to act in a pro-competitive manner" that protects SWBT's access revenues. Sibley/Weisman Aff. ¶ 27.

Southwestern Bell's initial Brief (at 62-66) detailed how consumers have benefitted when local exchange carriers have been permitted to compete in long distance. The interexchange carriers do not rebut this evidence, nor do they dispute that for years they have increased their prices in lock-step despite falling costs, and have neglected low-volume customers. For its part, the DOJ acknowledges "[i]nterLATA markets remain highly concentrated and imperfectly competitive, . . . and it is reasonable to conclude that additional entry, particularly by firms with the competitive assets of the BOCs, is likely to provide additional competitive benefits." DOJ at 3-4; see DOJ's Schwartz ¶¶ 91-98. Indeed, it would have been unimaginable for the Commission to fix AT&T's prices for residential service as part of its recent access charge reform package, if it believed that AT&T operated in a competitive market. Kahn Reply Aff. ¶ 19.[36] The accompanying reply affidavits of Kahn & Tardiff, Gordon, Richard Schmalensee, and Michael Raimondi further confirm that Southwestern Bell's interLATA entry will benefit Oklahomans, and particularly low-volume residential callers.

[36] The Commission's recent order also moots arguments that 271 relief may not precede access charge reform, an argument that is specious in any event. See WorldCom at 45-48; MCI at 41; see also Kahn Reply Aff. ¶ 38.

Approving Southwestern Bell's application would, moreover, promote local and intraLATA toll competition. It would allow the major interexchange carriers to bundle resold SWBT local services with their own long distance services, § 271(e)(1), and thus compete effectively for local customers with one-stop shopping. No opponent seriously disputes this fact. Nor is there any dispute that intraLATA toll callers will benefit from full 1+ dialing in combination with interLATA relief. But more important, approval of this application would encourage rapid local entry. After hearing testimony that CLECs' priorities lay elsewhere, the OCC concluded that further delaying Southwestern Bell's interLATA entry would keep the pressure off CLECs to enter the local market. It found that the "best and quickest way to get 'gas into the local exchange pipeline' would be for the FCC to approve [Southwestern Bell's] request for in-region interLATA authority." OCC at 11. "[O]nce full long distance competition is opened up in Oklahoma, the major competitive providers of local exchange service will take notice and adjust their respective business plans to move Oklahoma closer to the top of their schedules, resulting in faster and broader local exchange competition for Oklahoma consumers." Id.

Those who urge the Commission to deny this application in the name of local competition have it exactly backward. Such action would tell the major interexchange carriers and other CLECs that by continuing to profess interest in local markets while putting off actual entry, they can neutralize the competitive threat of Bell companies' emergence as full-service providers and safely continue their go-slow approach. Oklahomans and consumers in most other states will be rich in promises of future competition, but they will not have a choice of local carriers.

The Commission should not encourage these dilatory tactics. Since Congress passed the Telecommunications Act in early 1996, Southwestern Bell has worked tirelessly to open its local

markets. Yet if AT&T's Chairman were to have his way it would "be well into the next century before any [Bell company] serve[s] their first long-distance customer in their own territory."[37] The public interest demands that the Commission put an end to opponents' delays and enhance both local and long distance competition by permitting Bell company interLATA entry.

CONCLUSION

In the words of an opponent of the application, section 271 relief "presents a 'win-win' situation for consumers because they receive the benefits of increased competition in both toll and local markets . . . ." Time Warner at 6. The Commission should embrace this competition, not ally itself with those who want to delay it. The application of Southwestern Bell for in-region, interLATA relief in Oklahoma should be approved.

[37] John J. Keller, AT&T Challenges the Bell Companies; Allen Outlines Plans to Take Big Part of Local Market over Next Several Years, Wall Street Journal, June 12, 1996 (Br. App. Vol II, Tab 26).

Respectfully submitted,

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May 27, 1997

RESPONSE TO THE DEPARTMENT OF JUSTICE'S "EVALUATION" OF SOUTHWESTERN BELL'S APPLICATION FOR INTERLATA RELIEF IN OKLAHOMA

May 27, 1997

INTRODUCTION AND SUMMARY

The Oklahoma Corporation Commission ("OCC") certified after hearings and on-site investigation that local telephone markets in Oklahoma are open to competition, both in practice and as measured by Southwestern Bell's compliance with the 14-point competitive checklist of the Telecommunications Act of 1996. The OCC additionally determined that allowing Southwestern Bell to provide interLATA services pursuant to § 271 of the 1996 Act would make local as well as long distance telephone service in Oklahoma substantially more competitive, thereby serving the public interest.

The Department of Justice ("Department" or "DOJ") was invited to evaluate Southwestern Bell's application for interLATA relief with the OCC's findings in hand. Under the 1996 Act, there should have been no conflict between the OCC and DOJ, because these agencies were to advise the FCC within their distinct areas of expertise. While the OCC applied its on-the-scene experience to Southwestern Bell's compliance with the checklist and other local issues, DOJ was to use its knowledge of federal antitrust enforcement to assess the likely competitive effects of Southwestern Bell's entry into interLATA services.

DOJ's role was not to second-guess the Act's substantive requirements or to usurp the role of state commissions in verifying Bell company compliance with the Act's local competition provisions. Rather, DOJ was to make a judgment whether, if it satisfied the checklist criteria and thus opened its local network, a Bell company would augment long distance competition without causing counterbalancing competitive harm. Section 271 authorizes DOJ to evaluate the competitive effects of

Bell company interLATA entry using any antitrust standard it deems appropriate, but not to rewrite Congress's test of when local markets are sufficiently open.

Yet, in its first efforts under the new law, the Department invented and applied a test that has nothing to do with interLATA competition or its antitrust expertise and that ignores the proper roles of Congress and the States. Dismissing Congress's checklist and the OCC's record findings about Oklahoma markets, DOJ would bar interLATA relief because it is not convinced local markets in Oklahoma are "irreversibly open." This recommendation is contrary to Congress's legal determinations (within its proper sphere) and the OCC's factual determinations (within its proper sphere) and thus is entitled to no deference from the FCC.

DOJ Exceeds its Statutory Authority. Insofar as it answers the question Congress wanted it to address, DOJ finds that Southwestern Bell's provision of interLATA services in Oklahoma would enhance long distance competition.[1] Virtually ignoring this critical finding, however, DOJ pursues an altogether different inquiry into the adequacy of the Congress's checklist as a measure of open local markets. Finding the statutory standards and FCC rules inadequate, it adds new checklist requirements regarding operations support systems ("OSSs") as well as a de facto requirement of actual local competition. DOJ then urges the FCC to delay Southwestern Bell's admittedly desirable long distance entry until DOJ's own standard of sufficiently open local markets is satisfied.

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[1] Evaluation of the United States Department of Justice, Application of SBC Communications Inc., CC Dkt. No. 97-121 (filed May 16, 1997) ("DOJ Evaluation").